## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 3 |
| Statutes involved | 3 |
| Statement | 5 |
| Argument | 8 |
| Conclusion | 14 |


## CITATIONS

Cases:


| | |
|---|---|
| *Cherokee Nation* v. *United States*, 270 U.S. 476 | 11, 12 |
| *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468 | 12 |
| *United States* v. *Blackfeather*, 155 U.S. 180 | 11, 12 |
| *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275 | 11 |
| *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251 | 11 |


Treaties and statutes:


| | |
|---|---|
| Treaty of August 8, 1831, 7 Stat. 355 | |
| Treaty of October 11, 1842, Art. II, 7 Stat. 596 | 10 |
| Treaty of January 14, 1846, Art. II, 9 Stat. 842 | 10 |
| Treaty of June 5 and 17, 1846, Art. VII, 9 Stat. 854 | 10 |
| Act of January 9, 1837, 5 Stat. 135 | 9 |

Treaties and statutes—Continued Page

Act of September 11, 1841, 5 Stat. 465, 31 U.S.C. 547a ..... *passim*
Act of March 3, 1883, 22 Stat. 582 ..... 2, 3, 5, 6, 7
22 Stat. 590 ..... 3, 5
Act of March 2, 1887, 24 Stat. 449, 25 U.S.C. 155 ..... 2, 3, 5, 6
24 Stat. 463 ..... 3, 5
Act of May 25, 1918, Sec. 28, 40 Stat. 591, repealed by Sec. 2 of the Act of June 24, 1938, 52 Stat. 1037 (25 U.S.C. 162) ..... 9, 13
Act of February 12, 1929, 45 Stat. 1164 ..... 11
Act of June 13, 1930, Sec. 2, 46 Stat. 584, 25 U.S.C. 161b ..... 2, 3-4, 5, 7, 11
Act of June 24, 1938, Sec. 1, 52 Stat. 1037, 25 U.S.C. 162a ..... 9, 13
General Allotment Act, 24 Stat. 390 ..... 10
Indian Claims Commission Act, 60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.* ..... 6
Section 2(5), 25 U.S.C. 70a(5) ..... 12
Section 20(b), 25 U.S.C. 70s(b) ..... 7
R.S. (1870) 3659 ..... 11
28 U.S.C. 2516(a) ..... 7, 13

Miscellaneous:

H.R. Rep. No. 2320, 70th Cong., 2d Sess. (1929) ..... 11

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-939

MESCALERO APACHE TRIBE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A) is reported at 518 F.2d 1309. The opinion of the Indian Claims Commission (Pet. App. C) is reported at 31 Ind.Cl.Comm. 427. The opinion of the Indian Claims Commission denying rehearing in Ind.Cl. Comm. Docket No. 326-A (Pet. App. E) is reported at 33 Ind.Cl.Comm. 417. The original opinion of the Indian Claims Commission in Ind.Cl.Comm. Docket No. 326-A is reported at 23 Ind.Cl.Comm. 70. The original opinion of the Indian Claims Commission in

Ind.Cl.Comm. Docket No. 22-G is reported at 23 Ind. Cl.Comm. 181.

## JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1975. The order of the court denying a timely petition for rehearing was entered on October 3, 1975 (Pet. App. B). The petition for a writ of certiorari was filed on January 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). See Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1055, 25 U.S.C. 70s(c).

## QUESTIONS PRESENTED

The Acts of March 3, 1883, 22 Stat. 582, and March 2, 1887, 24 Stat. 449, 25 U.S.C. 155, established a fund composed of revenues produced by Indian reservations. The questions presented are:

1. Whether Section 2 of the Act of September 11, 1841, 5 Stat. 465, 31 U.S.C. 547a, or any other act prior to the Act of June 13, 1930, 46 Stat. 584, 25 U.S.C. 161b, required the United States to invest the portion of the fund not used for current expenditures and to reinvest the income thereby produced.

2. Whether the United States is liable to petitioners for compound interest as a result of its failure to invest the funds.

## STATUTES INVOLVED

The Act of March 3, 1883, 22 Stat. 582, 590, provides in pertinent part:

* * * * *

> The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, * * * and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.

The Act of March 2, 1887, 24 Stat. 449, 463, provides in pertinent part:

* * * * *

> That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of "Indian moneys, proceeds of labor," for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress.

The Act of June 13, 1930, 46 Stat. 584, 25 U.S.C. 161b, provides in pertinent part:

* * * * *

> Sec. 2. All tribal funds arising under the Act of March 3, 1883 (22 Stat. 590), as amended by the Act of May 17, 1926 (44 Stat. 560), now

included in the fund "Indian Money, Proceeds of Labor," shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930.

The Act of September 11, 1841, 5 Stat. 465, provides in pertinent part:

> Chap. XXV.—*An Act to repeal a part of the sixth section of the act, entitled "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," passed July seventh, eighteen hundred and thirty-eight.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the sixth section of an act entitled, "An act to provide for the support of the Military Academy of the United States for the year eighteen hundred and thirty-eight, and for other purposes," as requires the Secretary of the Treasury to invest the annual interest accruing on the investment of the money arising from the bequest of the late James Smithson, of London, in the stocks of States, be, and the same is hereby, repealed. And the Secretary of the Treasury shall, until Congress shall appropriate said accruing interest to the purposes prescribed by the testator for the increase and diffusion of knowledge among men, invest said accruing interest in any stock of the United

States bearing a rate of interest not less than five per centum per annum.

Sec. 2. *And be it further enacted*, That all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest.

* * * * *

**STATEMENT**

The Act of March 3, 1883, 22 Stat. 582, 590, provides that specified revenues from Indian reservations "be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe * * *." The account became known as IMPL.[1] The Act of March 2, 1887, 24 Stat. 449, 463, authorized the Secretary of the Interior to use the fund for the benefit of the several tribes at his discretion without further authorization by Congress. No provision was made for investment or payment of interest on the fund (Pet. App. A 3-4), and no interest was paid until 1930 when Congress provided for payment after July 1, 1930, of four percent simple interest on the current balance of each tribal account exceeding $500. Act of June 13, 1930, Sec. 2, 46 Stat. 584 (see pp. 3-4, *supra*). Thereafter, interest was credited as provided in the 1930 statute (Pet. App. A 6-7).

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[1] Indian Moneys-Proceeds of Labor, a misnomer because under the Act it consisted of Indian monies *not* the proceeds of labor.

Petitioners, under the Indian Claims Commission Act (60 Stat. 1049, as amended, 25 U.S.C. 70 *et seq.*), sought accountings by the United States for all of their funds held by it, including IMPL funds. The United States reported as follows with respect to IMPL funds (Pet. App. A 7):

> [I]n the *Te-Moak* case, Docket No. 326-A, * * * $314,241.19 was deposited in its I.M.P.L. account between 1899 and 1951, and * * * no interest was paid on the fund until June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.
>
> In Shoshone-Bannock, Docket No. 326-C * * * $380,628.76 was deposited in its I.M.P.L. account between 1887 and 1951, and * * * no interest was paid on the account prior to June 30, 1930, after which date interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.
>
> In Mescalero Apache, Docket No. 22-G, * * * $1,670,620.38 was deposited in the I.M.P.L. account between 1887 and 1950, and * * * no interest was paid on this account until June 30, 1930, after which interest was paid pursuant to the Act of June 13, 1930, at the rate of four percent per annum.[2]

The Indian Claims Commission held (Pet. App. C 55-180) that, under the Act of September 11, 1841 (see pp. 4-5, *supra*), the United States was required to invest the funds not needed for current disburse-

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[2] The United States does not deny that these funds are held in trust for the Tribes in question. See Pet. App. A 47).

ments at five percent interest and to reinvest earnings at a like rate (see Pet. App. C 149-153), and that the government's liability should be measured accordingly. The Commission ordered the parties to meet, and, in effect, prepare a pre-trial statement on the additional accounting that would be necessary to comply with the Commission's ruling (Pet. App. C 168-169). There was a concurring opinion by Commissioner Vance (Pet. App. C 170-175) and a dissent by Commissioner Yarborough (Pet. App. C 176-180).

The United States appealed to the Court of Claims [3] which, *en banc*, held that petitioners were not entitled to receive either simple or compound interest on the funds in question. The court held (Pet. App. A 3-7) that the Act of March 3, 1883, as supplemented by the Act of March 2, 1887, did not require payment of interest on IMPL funds deposited in the Treasury, and that interest on this fund was first required by the Act of June 13, 1930.

The court emphasized that interest is collectable against the United States only as specifically permitted by contract or statute (Pet. App. A 8-19); 28 U.S.C. 2516(a) specifically provides that interest against the United States may be allowed "only under a contract or Act of Congress expressly providing for payment thereof." The court considered in detail (Pet. App. A 23-26) the history and purpose of the Act of September 11, 1841, and held that it was not a direction to invest all trust funds held in the

[3] Interlocutory appeal is authorized by 25 U.S.C. 70s(b).

Treasury but was a determination of the kinds of investment that could be made of funds otherwise required to be invested. It found no such investment required by the 1883 Act establishing the IMPL fund.[4] The court denied petitioners' motion for rehearing; Judge Davis dissented (Pet. App. B 53-54).

## ARGUMENT

The complex historical background of the handling of Indian funds by the United States has been explored exhaustively in this litigation by the parties, the Indian Claims Commission and the Court of Claims. The decision of the Court of Claims is correct; and it definitively settles the question whether the United States is liable for not investing IMPL funds prior to 1930. There is no reason for further review by this Court.

Petitioners contend, as they did before the Indian Claims Commission and the Court of Claims, that IMPL funds should have been invested by the government at five percent compound interest under the Act of September 11, 1841 (Pet. 8-11). Petitioners also suggest that the same result can be reached under the common law of trusts; the fair and honor-

[4] In his concurring opinion, Judge Nichols equated the IMPL funds to checking accounts (Pet. App. A 39). Judge Davis dissented in part; he agreed that unless a statute required the government to invest the funds it could not be held liable, but he thought the fund was covered by the investment provision of the 1841 Act and in any event that recovery could be had under the fair dealings provision of the Indian Claims Commission Act (Pet. App. A 39-51).

able dealings standard of the Indian Claims Commission Act; and Section 28 of the Act of May 25, 1918,[5] and the Act of June 24, 1938[6] (Pet. 11-12).

1. The Court of Claims discussed at length the application of the Act of September 11, 1841, to Indian funds. In the 1830's there were a number of funds held in trust by the United States under various Indian treaties. By the Act of January 9, 1837, 5 Stat. 135, Congress provided that these funds could be paid into the Treasury, and if the treaties required that they be invested, they could be invested at the direction of the President (Pet. App. A 23).

Large amounts of these funds were invested in state bonds. Shortly after the Act of January 9, 1837, a financial panic and depression caused several States to default on their bonds. As the court below stated (Pet. App. A 23-24), it was against this background, but with the funds of the Smithsonian bequest as its principal concern, that Congress enacted the Act of September 11, 1841 (pp. 4-5, *supra*).

The Court of Claims held that (Pet. App. A 22-23) "[t]he primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds. Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided *where* they must be invested if any statute or treaty required them to be productive" (emphasis by the court).

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[5] 40 Stat. 591, repealed by Section 2 of the Act of June 24, 1938, 52 Stat. 1037. See 25 U.S.C. 162.

[6] 52 Stat. 1037, Sec. 1, 25 U.S.C. 162a.

The Commission and the Court of Claims also reviewed the legislative and administrative treatment of the 1841 Act between its enactment and the present, finding nothing to indicate that the Act was read as requiring the investment of all Indian funds held in trust by the United States at five percent compound interest (Pet. App. A 21-26).

The various treaty provisions and statutes governing Indian funds enacted after the 1841 Act also support the court's view of the Act. These treaties and statutes are difficult to explain if, in fact, all Indian funds held by government agents should have been invested at five percent compound interest. Numerous Indian treaties after 1841 continued to contain a provision for investment of funds, usually at a specified rate of interest, as they had before that date.[7] Such provisions were at best surplusage if a statutory duty already existed to invest all Indian funds at five percent compound interest. Moreover, Section 5 of the General Allotment Act (24 Stat. 390), provided only for three percent simple interest on proceeds of land sales, and numerous statutes provided for four percent interest on Indian funds. Yet there is no indication that those Acts were considered a reduction of otherwise established rates of interest.

Similarly, if there had existed in 1929 and 1930 a general duty to invest Indian funds at five percent

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[7] See, *e.g.*, Treaty of October 11, 1842, Art. II, 7 Stat. 596; Treaty of January 14, 1846, Art. II, 9 Stat. 842; Treaty of June 5 and 17, 1846, Art. VII, 9 Stat. 854.

compound interest, the Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, providing that all Indian accounts in the Treasury in excess of $500 shall bear four percent simple interest, would have been a disservice to the Indians. Yet the legislation was designed to benefit the Indian tribes, not to deprive them of what they already had.[8]

This Court has cited the Act of 1841 in four decisions,[9] all of which are discussed by the court below (Pet. App. A 26-29). In two cases, the Court held that the Act did not apply because no trust existed.[10] The remaining cases, *Blackfeather* and *Cherokee Nation*, concerned treaties establishing a duty to pay interest or invest funds. In *Blackfeather* the Court held that a treaty provision calling for establishment of a fund through sale of Indian land, and payment of five percent interest on the balance of the fund, supported an award of principle and simple interest on a deficiency in the fund created by the failure of the government to sell the land in the manner required by the treaty. The Court stated that the treaty called for the same interest "paid upon funds held in trust by the United States" under the Act of 1841 (then R.S. 3659), but did not otherwise comment on the Act (155 U.S. at 192).

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[8] See H.R. Rep. No. 2320, 70th Cong., 2d Sess. (1929).

[9] *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 255; *United States* v. *Blackfeather*, 155 U.S. 180, 192; *United States* v. *Omaha Tribe of Indians*, 253 U.S. 275, 281-282; *Cherokee Nation* v. *United States*, 270 U.S. 476, 492.

[10] *Angarica* and *Omaha Tribe*, *supra*.

In *Cherokee Nation* v. *United States*, 270 U.S. 476, 492, the Court held that the Act of 1841 provided no basis for paying compound, rather than simple interest, on a judgment awarded for funds taken from a trust account established by treaty, pointing out that a contrary interpretation would subject the government to liability in an amount equal to what was then the national debt. The Court's reading of the Act of 1841 in *Cherokee Nation*, while not controlling here, is consistent with the Court of Claims' holding that the Act of 1841 did not require investment of the IMPL account and does not justify an award of compound interest for failure to invest.[11]

2. Petitioners contend (Pet. 11-12) that the Commission's decision should have been sustained under common law (equity) principles of trusts and the grant of jurisdiction to the Indian Claims Commission to hear (25 U.S.C. 70a(5)) "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." While the Court of Claims did not discuss these claims in detail, it did specifically reject them on the basis of the court's prior decisions and 28 U.S.C. 2516(a), which

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[11] Petitioners' contention (Pet. 8-9) that the decision below "conflict[s] in principle" with *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468, is incorrect. There the interest the government was required to pay was established by treaty, as it was in *United States* v. *Blackfeather*, 155 U.S. 180, which it followed. Moreover, in *Peoria*, the Court expressly prohibited an award of compound interest. 390 U.S. at 473 n. 6.

authorizes the Court of Claims to allow interest on a claim against the United States only when a contract or federal statute expressly so provides. (see Pet. App. A 36-37).[12] In light of the statutes and treaties specifically requiring investment of funds when Congress found this appropriate, and in light of the absence of such a provision here, as well as the "checking account" nature of the fund (Pet. App. A 39, Nichols, J., concurring), the court properly refused to accept petitioners' claim of breach of trust responsibility or lack of fair dealing.

3. Petitioners finally contend (Pet. 12) that the Commission's decision can be sustained, at least with respect to the period after 1918, by Section 28 of the Act of May 25, 1918,[13] and the Act of June 24, 1938,[14] which replaced the 1918 Act. These Acts *permitted* the Secretary of the Interior to place Indian funds in bank accounts subject to withdrawal by the Tribe or to invest them. They did not *require* him to invest such funds.

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[12] As to the fair and honorable dealings claim, see, also, the dissenting opinion (Pet. App. A 49-51; and *id.* at B 54).

[13] See note 5, *supra.*

[14] See note 6, *supra.*

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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